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## **Staub v. Proctor Hospital and the Age Discrimination in Employment Act**

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*STAUB V. PROCTOR HOSPITAL*  
AND THE  
AGE DISCRIMINATION IN EMPLOYMENT ACT

*Elizabeth Reburn\**

I. INTRODUCTION

The theory of cat's paw liability derives from a children's fable dating back to the 1600s.<sup>1</sup> In the fable, a cat and a monkey are friends.<sup>2</sup> One day, sitting by the fire, they see some chestnuts roasting and become determined to eat them.<sup>3</sup> Not wanting to burn his own paw, the monkey convinces the cat to reach into the fire and get the nuts, telling the cat he would divide them up once they were out.<sup>4</sup> As the cat pulled the chestnuts out of the fire, burning its paws as it went, the monkey ate all of the chestnuts, leaving none for the cat.<sup>5</sup>

In 1990, Judge Richard Posner applied the theory of the cat's paw to a case that arose in employment discrimination.<sup>6</sup> Within the employment discrimination context, when "a biased individual takes an action against another person based on a protected trait, but an unbiased individual ultimately makes the challenged employment decision[.]" this is known as "cat's paw" liability.<sup>7</sup> In 2011, seeking to resolve a circuit split,<sup>8</sup> the Supreme Court addressed the issue of cat's paw liability in *Staub v. Proctor Hospital*.<sup>9</sup> Rather than providing clarification, however, the Court "opened the proverbial can of worms, leaving a number of

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1. *Staub v. Proctor Hosp.*, 562 U.S. 411, 415 n.1 (2011); see also Julie M. Covell, *The Supreme Court Writes a Fractured Fable of the Cat's Paw Theory in Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), 51 WASHBURN L. J. 159, 159 (2011).

2. *Aesopica: Aesop's Fables in English, Latin & Greek, The Monkey and the Cat*, MYTHICFOLKLORE.NET, <http://mythfolklore.net/aesopica/milowinter/61.html> (last visited Feb. 17, 2015) [hereinafter *Aesopica*].

3. *Aesopica*, *supra* note 2.

4. *Id.* See also Covell, *supra* note 1, at 159.

5. *Aesopica*, *supra* note 2; see also Covell, *supra* note 1, at 159.

6. *Staub v. Proctor Hosp.*, 562 U.S. 411, 415 n.1 (2011); see also Covell, *supra* note 1, at 159 ("In 1990 La Fontain's fable took on expanded meaning when the U.S. Court of Appeals for the Seventh Circuit used it as a means of explaining the unusual circumstances that had formed the basis for an employer's age discrimination lawsuit against his employer in *Shager v. Upjohn Company*.").

7. Sandra F. Sperino, *Discrimination Statutes, The Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1, 4 (2013).

8. Covell, *supra* note 1, at 160.

9. See *Staub*, 562 U.S. 411; see also Covell, *supra* note 1, at 160.

unresolved questions about its scope.”<sup>10</sup>

A number of these questions relate to the Age Discrimination in Employment Act (ADEA).<sup>11</sup> In the years since *Staub*, lower courts have differed in their interpretation of the holding given by the Court, and have struggled to apply the doctrine of proximate cause to cat’s paw cases arising under the ADEA.<sup>12</sup> This Casenote discusses these differing interpretations, and seeks to solve an area of legal turmoil. Part II of this Casenote introduces *Staub v. Proctor Hospital*. It then provides a brief discussion on the construction of the causation standard included in the ADEA and the Supreme Court’s interpretation of this construction in *Gross v. FBL Financial Services*. Finally, Part II discusses the various attempts of the circuits to apply the rule in *Staub v. Proctor Hospital* to cat’s paw cases arising under the ADEA. Part III discusses the federal courts highly criticized use of tort law within the employment discrimination field. Part III argues a new interpretation of the intersection of *Staub*, the ADEA, and proximate cause, arguing that the ADEA permits cat’s paw liability, but that cat’s paw liability under the ADEA is not coterminous with the same concept under other statutes. Finally, Part IV concludes that the Third Circuit’s approach to *Staub*’s proximate cause holding to a case arising under the ADEA provides a workable standard which should be followed by the Supreme Court should the issue of cat’s paw liability in ADEA cases be revisited.

## II. BACKGROUND

### A. *Staub v. Proctor Hospital*

In 2011, the Supreme Court of the United States sought to address the growing concern with cat’s paw liability cases with a decision in *Staub v. Proctor Hospital*.<sup>13</sup> This case arose under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).<sup>14</sup> USERRA was enacted in 1994 for a number of purposes, one of which was “to prohibit discrimination against persons because of their service in the uniformed services.”<sup>15</sup> Vincent Staub was employed by Proctor

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10. Lisa M. Durham Taylor, *The Pro-Employee Bent of the Roberts Court*, 79 TENN. L. REV. 803, 832 (2012).

11. See *id.* at 832-34 (“[T]he context of *Staub*, presenting a claim under USERRA, leaves in some doubt the applicability of cat’s paw liability under . . . the ADEA.”).

12. See *id.* at 833-34 (discussing a number of the circuit court decisions which had been decided in the year following *Staub*). This Casenote will address these, as well as others which have occurred since.

13. See *Staub*, 562 U.S. 411; see also Covell, *supra* note 1, at 160.

14. *Staub*, 562 U.S. at 415.

15. Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §

Hospital as an angiography technician until 2004, when the hospital terminated him.<sup>16</sup> During the time Staub was employed by the hospital, he also participated in the United States Army Reserve.<sup>17</sup> Two of Staub's supervisors expressed hostility to his involvement in the military.<sup>18</sup> Because of this hostility, the supervisors took numerous negative actions against him, including issuing disciplinary warnings for his alleged violation of hospital rules.<sup>19</sup> The anti-military animus held by Staub's supervisors culminated in Staub's termination in 2004.<sup>20</sup> In seeking this termination, one of Staub's supervisors complained to the Vice President of human resources for the hospital, stating that Staub had yet again violated a company rule.<sup>21</sup> Relying on this information, the Vice President, who was not alleged to be hostile to Staub's participation in the United States Army Reserve, reviewed Staub's personnel file and ultimately terminated his employment.<sup>22</sup>

In considering the issue of cat's paw liability in this case, the Court sought to settle a divide between multiple circuits.<sup>23</sup> Determining whether Proctor Hospital could be held liable for the actions taken by Staub's supervisors—who were not ultimately responsible for his termination—required the Court to turn to the causation standard of USERRA.<sup>24</sup> In relevant part, the language reads, “An employer shall be considered to have engaged in actions prohibited . . . under subsection (a), if the person's membership . . . is a motivating factor in the employer's action . . . .”<sup>25</sup>

The Court started with the premise “that employment discrimination is a federal tort.”<sup>26</sup> In considering this language, the Court stated, “when Congress creates a federal tort it adopts the background of general tort law.”<sup>27</sup> Discussing this, the Court noted that “[i]ntentional torts such as this, ‘as distinguished from negligent or reckless torts, . . . generally require that the actor intend the consequences of an act, not simply the

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4301(a)(3) (2012).

16. *Staub*, 562 U.S. at 413.

17. *Id.* at 413-14.

18. *Id.* at 414.

19. *Id.* at 414-15.

20. *Id.* at 415.

21. *Staub*, 562 U.S. at 414.

22. *Id.* at 415.

23. Covell, *supra* note 1, at 160.

24. *Staub*, 562 U.S. at 417.

25. *Id.* at 1190-91 (quoting Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4311(c) (2012) (emphasis in original)).

26. Covell, *supra* note 1, at 178 n.189 (“The Court began its analysis of this case based on the assertion that employment discrimination is a federal tort created by Congress and therefore principles of tort law should govern.”); *Staub*, 562 U.S. at 417.

27. *Staub*, 562 U.S. at 417.

act itself.”<sup>28</sup> In determining which standard to apply to cases brought under claims of cat’s paw liability, the Court first considered the basic principles of agency law.<sup>29</sup> Although the Court first noted that “the malicious mental state of one agent cannot generally be combined with the harmful action of another agent to hold the principle liable for a tort that requires both,” the Court then stated, “[a]nimus and responsibility for the adverse action can both be attributed to the earlier agent . . . if the adverse action is the intended consequence of that agent’s discriminatory conduct.”<sup>30</sup> To make sense of this finding, the Court then turned to the doctrine of proximate cause.<sup>31</sup> In discussing the doctrine of proximate cause, the Court noted

it is axiomatic under tort law that the exercise of judgment by the decision maker does not prevent the earlier agent’s action . . . from being the proximate cause of the harm. Proximate cause requires only “some direct relation between the injury asserted and the injurious conduct alleged,” and excludes only those “link[s] that are too remote, purely contingent, or indirect.”<sup>32</sup>

Relying on this, the Court held that “if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.”<sup>33</sup>

Although this case came before the Court under USERRA,<sup>34</sup> the Court took careful note of the similarities between USERRA and Title VII,<sup>35</sup> leading scholars to conclude this decision was to be far reaching in its application to employment discrimination cases.<sup>36</sup> At the same time, scholars viewed this decision as one which would create more questions than it would answer.<sup>37</sup>

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28. *Id.* (internal quotations omitted and emphasis removed).

29. *See Staub*, 562 U.S. at 418-22.

30. *Id.* at 418-19.

31. *Id.* at 419-20.

32. *Id.* at 419 (quoting *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9 (2010)).

33. *Id.* at 422 (emphasis in original).

34. *See Staub*, 562 U.S. at 416-17.

35. *Id.* at 417.

36. Taylor, *supra* note 10, at 832-33; Sperino, *supra* note 7, at 5; Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U.L. REV. 1431, 1435 (2012).

37. Taylor, *supra* note 10, at 832; Timothy P. Powderly, *Limiting the Ways to Skin a Cat – An End to the Twenty Year Perplexity of the Cat’s Paw Theory in Staub v. Proctor?*, 31 ST. LOUIS U. PUB. L. REV. 617, 621 (2012).

*B. The Age Discrimination in Employment Act*

The Age Discrimination in Employment Act (“ADEA”) was enacted in 1967.<sup>38</sup> In passing this law, Congress intended to promote the employment of the elderly “based on their ability rather than age.”<sup>39</sup> Congress further intended to prohibit discrimination based upon age in the workplace.<sup>40</sup>

In Section 623 of the ADEA, Congress set forth those employment practices that are unlawful.<sup>41</sup> Section 623(a) states:

(a) Employment Practices. It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.<sup>42</sup>

This section of the ADEA is similar to Section 2000e-2(a) of Title VII, which also sets forth unlawful employment practices.<sup>43</sup> In 1991, however, Congress altered Title VII in one significant aspect.<sup>44</sup>

With the 1991 amendments to Title VII, Congress included Section 2000e-m.<sup>45</sup> This section codified the “mixed-motive analysis.”<sup>46</sup> The mixed-motive analysis refers to those instances in which the defendant employer had multiple reasons for taking an adverse employment action

38. SUSAN GROVER ET AL., EMPLOYMENT DISCRIMINATION: A CONTEXT AND PRACTICE CASEBOOK 52 (2011).

39. The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621(b) (2012).

40. *Id.* § 621(b).

41. *See id.* § 623; *see also* GROVER ET AL., *supra* note 38, at 52-53 (providing a discussion of the ADEA and, more specifically, discusses section 623 of the Act).

42. 29 U.S.C. § 623(a); *see also* GROVER ET AL., *supra* note 38, at 52.

43. *See* The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012); *see also* Smith v. City of Jackson, Miss., 544 U.S. 228, 233 (2005) (“Except for the substitution of the word ‘age’ for the words ‘race, color, religion, sex, or national origin’ the language of that provision in the ADEA is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII). Other provisions of the ADEA also parallel the earlier statute.”); *see also* GROVER ET AL., *supra* note 38, at 167-69.

44. *See* GROVER ET AL., *supra* note 38, at 85.

45. *Id.*

46. *Id.*

against an employee, in particular when an employer has “one legitimate reason and one discriminatory reason.”<sup>47</sup> This amended section reads:

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices.

Except as otherwise provided in this title [42 U.S.C.S. §§ 2000e et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.<sup>48</sup>

With the inclusion of this section in Title VII, a complainant who suffers an adverse employment action may obtain relief even if the action was taken with a legitimate motive in addition to a discriminatory motive.<sup>49</sup>

Notably, when Congress included this section in Title VII, it did not amend the ADEA to include a similar section.<sup>50</sup> The causation standard employed by the ADEA differs significantly from Title VII’s causation standard.<sup>51</sup> As previously noted, the ADEA prohibits a number of employment practices taken by employers “because of” an employee’s age.<sup>52</sup> In 2011, the Supreme Court, in *Gross v. FBL Financial Services*, was asked to determine “whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed motives jury instruction” when faced with a claim arising under the ADEA.<sup>53</sup> With this case, the Court was called upon to make a decision determining whether individuals who suffered discrimination because of their age would be able to obtain relief when their employer was able to offer a nondiscriminatory reason for its decisions.<sup>54</sup> In the end, the Court made clear the import of Congress’s decision not to amend the ADEA to include the mixed motive provision that is included in Title VII.<sup>55</sup>

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47. *Id.* at 74.

48. 42 U.S.C. § 2000e-2(m) (1991); *see also* GROVER ET AL., *supra* note 38, at 85 (providing a discussion on this section of the statute).

49. GROVER ET AL., *supra* note 38, at 74, 85.

50. *Id.* at 85.

51. *See* The Age Discrimination in Employment Act, 29 U.S.C. § 623 (2012); *see also* 42 U.S.C. § 2000e-2(m); *see also* Taylor, *supra* note 10, at 833; *see also* GROVER ET AL., *supra* note 38, at 85.

52. 29 U.S.C. § 623 (2012) (emphasis added); *see also* Sperino, *supra* note 7, at 20 (“Although the first step in the ADEA disparate impact analysis is similar to that of Title VII cases, the remaining analysis is different.”).

53. *See* *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 169-70 (2009).

54. *Id.*

55. *Id.* at 174.

*C. Gross v. FBL Financial Services*

In *Gross v. FBL Financial Services*, plaintiff Jack Gross sought to establish that his age played a role in the adverse employment action taken by his employer, FBL Financial Group, Inc.<sup>56</sup> Seeking to have the Court interpret the ADEA to allow him to pursue a mixed motive claim, Gross relied on the Supreme Court's decisions interpreting Title VII.<sup>57</sup>

In comparing the language of the ADEA to that of Title VII, the Court noted, "[w]hen conducting statutory interpretation, we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination."<sup>58</sup> The ADEA, unlike Title VII, does not include "motivating factor" language.<sup>59</sup> Rather, the ADEA states that certain actions may not be taken "because of" an employee's age.<sup>60</sup> The Court also noted that Congress failed to add a provision including the motivating factor language to the ADEA when it amended Title VII, although it amended other provisions within the ADEA.<sup>61</sup> Noting the significance of this omission, the Court stated, "[w]hen Congress amends one statutory provision but not another, it is presumed to have acted intentionally."<sup>62</sup>

Focusing on the language of the ADEA, the Court determined that an individual cannot proceed on a mixed motive theory of discrimination.<sup>63</sup> To support this conclusion, the Court discussed the proper interpretation of the statute's causal standard.<sup>64</sup> As previously stated, the ADEA states that an individual cannot be discriminated against "because of such individual's age."<sup>65</sup> Referencing the common definitions applied to this language generally<sup>66</sup> the Court determined that "but-for" causation must

56. *Id.* at 170.

57. *See id.* at 173 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989)) ("Petitioner relies on this Court's decisions construing Title VII for his interpretation of the ADEA . . . In *Price Waterhouse*, a plurality of the Court and two justices concurring in the judgment determined that once a 'plaintiff in a Title VII case proves that [the plaintiff's membership in a protected class] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [that factor] into account.'").

58. *Id.* at 174 (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)).

59. *Id.* at 176; *see also* The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (2012).

60. *Gross*, 557 U.S. at 176 (citing 29 U.S.C. § 623(a)(1)).

61. *Id.* at 174.

62. *Id.*

63. *Id.* at 175.

64. *Id.* at 175-77.

65. *Gross*, 557 U.S. at 176 (citing 29 U.S.C. § 623(a)(1)).

66. *Id.* ("The words 'because of' mean 'by reason of; on account of' . . . Thus, the ordinary meaning of the ADEA's requirement that an employer took adverse action 'because of' age is that age was the 'reason' that the employer decided to act.").



be met under the ADEA.<sup>67</sup>

Under but-for causation, it must be found that the plaintiff's harm would not have occurred but for the actions of the defendant.<sup>68</sup> Generally, "[i]f the plaintiff would have suffered the same harm had the defendant not acted negligently, the defendant's conduct is not a factual cause of the harm."<sup>69</sup> In the ADEA context, an employer's consideration of an individual's age is the but-for cause of the adverse employment action if "age was the 'reason' that the employer decided to act."<sup>70</sup>

#### *D. Proximate Cause*

To fully understand the significance of the Supreme Court's importation of proximate cause into the holding of *Staub*, one must first understand exactly what the doctrine of proximate cause entails.<sup>71</sup> When considering causation at the common law, two separate issues are measured: "cause in fact and legal or proximate cause."<sup>72</sup> Factual cause is found "when the harm would not have occurred absent the conduct."<sup>73</sup> The proximate cause of an event is the legal cause.<sup>74</sup> Perhaps a misnomer, "[t]he so-called proximate cause issue is not about causation at all but about the appropriate scope of legal responsibility."<sup>75</sup> Courts do not consider proximate cause until factual cause has been established.<sup>76</sup>

To illustrate, consider a vacuum manufacturer.<sup>77</sup> The defendant in this example manufactures a vacuum negligently, resulting in the vacuum lacking proper suction.<sup>78</sup> After failing to get the vacuum to function as it should, the owner of the vacuum takes it to be repaired.<sup>79</sup> While taking the vacuum into the repair shop, the owner is hit by a car

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67. *Id.* at 177.

68. DAN B. DOBBS ET AL., DOBB'S LAW OF TORTS § 186 (2d ed. 2011).

69. *Id.*

70. *Gross*, 557 U.S. at 176 (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)). The Court goes on to state that, "[t]o establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the 'but-for' cause of the employer's adverse decision. *Id.*

71. Sperino, *supra* note 7, at 4; see also Sullivan, *supra* note 36, at 1448.

72. Sperino, *supra* note 7, at 6.

73. *Id.* at 6 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 26 (2010)).

74. *Id.*

75. DOBBS ET AL., *supra* note 68, at § 198.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

and is injured.<sup>80</sup> Although negligence of the manufacturer in constructing the vacuum is one of the several *factual causes* of the owner's harm, many would agree that the negligence of the manufacturer was not the *proximate cause* of the harm, "because the [manufacturer's] negligence did not create or increase the risk of injury in a vehicular collision."<sup>81</sup>

As seen in the example, one factor of proximate cause is foreseeability.<sup>82</sup> Despite the fact that leading scholars have noted this as a general factor,<sup>83</sup> "courts have not arrived at a consistent concern or set of concerns that underlie" the doctrine of proximate cause.<sup>84</sup> The Supreme Court recently noted the myriad of definitions that exist for the doctrine, with such approaches including "the immediate or nearest antecedent test; the efficient, producing cause test; the substantial factor test; and the probable, or natural and probable, or foreseeable consequence test."<sup>85</sup> With such a plethora of definitions in existence, it should come as no surprise that the importation of proximate cause into the world of employment discrimination left the lower courts in a state of confusion.<sup>86</sup>

### *E. The Application of the Staub Standard to the ADEA*

Since the Supreme Court decided *Staub v. Proctor Hospital* in 2011, a number of the circuit courts have considered the applicability of its rule to cases arising under the ADEA.<sup>87</sup> A thorough analysis of this caselaw is necessary to fully understand the approaches taken by each of the courts. This subpart will discuss each of these cases, and the different ways in which the circuits have approached *Staub's* proximate cause holding.

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80. DOBBS ET AL., *supra* note 68, at § 198.

81. *Id.*

82. *See id.* ("The most general and pervasive approach to scope of liability or proximate cause holds that a negligent defendant is liable for all the general kinds of harms he foreseeably risked by his negligent conduct and to the class of persons he put at risk by that conduct.")

83. *Id.*

84. Sperino, *supra* note 7, at 6.

85. *Id.* at 8 (quoting *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2642 (2011)).

86. Powderly, *supra* note 37, at 621; *see also* Taylor, *supra* note 10, at 834.

87. *Sharp v. Aker Plant Servs. Group*, 726 F.3d 789, 797 (6th Cir. 2013); *Sims v. MVM, Inc.*, 704 F.3d 1327, 1334-37 (11th Cir. 2013); *Holliday v. Commonwealth Brands, Inc.*, 483 F. App'x 917, 922 (5th Cir. 2012); *Marcus v. PQ Corp.*, 458 F. App'x 207, 211-12 (3d Cir. 2012); *Wojtanek v. Dist. No. 8, Int'l Ass'n of Machinists & Aero. Workers*, 435 F. App'x 545, 549 (7th Cir. 2011); *Simmons v. Sykes Enters.*, 647 F.3d 943, 949-50 (10th Cir. 2011).

## 1. Cat's Paw Liability Under the ADEA

In 2013, the Court of Appeals for the Sixth Circuit had reason to consider the holding of *Staub* in relation to an issue of age discrimination with *Sharp v. Aker Plant Services Group, Inc.*<sup>88</sup> Although this issue came before the court under the Kentucky Civil Rights Act, the court analyzed this statute with the same approach used under the ADEA.<sup>89</sup>

Plaintiff Tommy Sharp started work with defendant Aker Plant Services Group in 2003.<sup>90</sup> He first worked as a contract employee for the company and was hired full-time in 2005.<sup>91</sup> During 2008 and 2009, the company was forced to lay off a number of employees due to the cancelation of projects by customers.<sup>92</sup> Sharp was one of these employees.<sup>93</sup> In addition to other evidence, Sharp offered two conversations as direct evidence that his supervisor, Hudson, had terminated him because of his age.<sup>94</sup> In these conversations, Hudson directly stated that Sharp's age was the determining factor in his termination.<sup>95</sup>

In the decision, the court applied the holding given in *Staub v. Proctor Hospital*.<sup>96</sup> While Sharp's supervisor, Hudson, was the individual making the comments, he was not who ultimately terminated Sharp.<sup>97</sup> Recognizing the holding of *Staub*, the court noted that an "employer may escape liability if it conducts an investigation that uncovers justification for the adverse action that is 'unrelated to the supervisor's original biased action.'"<sup>98</sup> The court further noted that "the supervisor's biased report may remain a causal factor, [making the employer liable] if the independent investigation takes it into account without determining that the adverse action was, apart from the

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88. *Sharp*, 726 F.3d at 797.

89. *Id.* at 796-97.

90. *Id.* at 792.

91. *Id.*

92. *Id.*

93. *Sharp*, 726 F.3d at 792.

94. *Id.* at 792-93 ("The key piece of evidence for Sharp consists of two conversations with Hudson that occurred in 2009 after Sharp was told he would be laid off . . . But Sharp begins by pointing to evidence that dates to sometime before June 2006, when Hudson allegedly made comments about the advancing age of the design group and the need to bring in younger people.").

95. *Id.* at 794-96.

96. *Id.* at 797.

97. *Id.* ("Although Hudson was not the ultimate decision maker, Dellinger and Atkins relied solely on Hudson's forced rankings and recommendation of who Aker could fire without disrupting current projects.").

98. *Sharp*, 726 F.3d at 797 (quoting *Staub v. Proctor Hosp.*, 562 U.S. 411, 421 (2011)).

supervisor's recommendation, entirely justified."<sup>99</sup> As Aker had based the termination of Sharp solely on the recommendation and rankings of Hudson, the court determined that Hudson's remarks could serve as direct evidence of discrimination.<sup>100</sup>

The Tenth Circuit, in *Simmons v. Sykes Enterprises*, also considered the question of whether the *Staub* holding applies to cases arising under the ADEA.<sup>101</sup> The plaintiff, Patricia Simmons, had worked for Sykes since 1997.<sup>102</sup> Although she started as a phone technician, she later became a technician/assistant within the Department of Human Resources.<sup>103</sup> In June of 2007, Simmons began experiencing age-related hostility from both the site director and the HR supervisor.<sup>104</sup>

In August of 2007, an employee at Sykes complained to the HR supervisor that her "confidential medical information" had been disclosed.<sup>105</sup> An investigation followed this complaint.<sup>106</sup> The regional site manager, as well as the individuals who had been hostile towards Simmons regarding her age, conducted the investigation.<sup>107</sup> After the investigation, Simmons and a fellow employee were terminated for disclosure of confidential information.<sup>108</sup> The official termination recommendation was given by Janice DiRose, corporate employment counsel and senior director of HR compliance at Sykes.<sup>109</sup> The recommendation was made to Jenna Nelson, the senior vice president of HR, who authorized the termination.<sup>110</sup> Prior to recommending termination of Simmons and her fellow employee, Ms. DiRose reviewed the statements prepared by those who had conducted the initial investigation, and personally interviewed Ms. Simmons and her fellow employee.<sup>111</sup>

The court analyzed Simmons's case under the theory of cat's paw liability.<sup>112</sup> In conducting this analysis, the court noted that the Supreme Court had recently considered cat's paw liability in *Staub v. Proctor*

99. *Id.* (quoting *Staub*, 562 U.S. at 421).

100. *Id.* at 797-98, 802.

101. *Simmons v. Sykes Enters.*, 647 F.3d 943, 949 (10th Cir. 2011).

102. *Id.* at 945.

103. *Id.*

104. *Id.* at 945-46.

105. *Id.* at 946.

106. *Simmons*, 647 F.3d at 946.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Simmons*, 647 F.3d at 946.

112. *Id.* at 949. The court also reviewed Simmons's case for age discrimination under the framework outlined in *McDonnell-Douglas*. *Id.* at 947-48.

*Hospital*.<sup>113</sup> Thus the first step was determining whether the holding in *Staub* applied to cases arising under the ADEA.<sup>114</sup> In making this determination, the court noted that the language of the ADEA differs from that in USERRA and Title VII.<sup>115</sup> Rather than using “motivating factor” language, “[a] plaintiff alleging age discrimination must instead prove age was a ‘but-for’ cause of her termination.”<sup>116</sup> This posed somewhat of an issue for the court, as it noted that the motivating factor language present in USERRA served as “the operative phrase relied upon in *Staub*.”<sup>117</sup> These linguistic differences proved significant in the court’s eyes: “[i]f we were to apply *Staub* directly to an age-discrimination case, the plaintiff would then only need to prove her supervisor’s animus was somehow related to the termination and not that the animus was necessary to bring about the termination.”<sup>118</sup>

Despite the difference in the language between the various statutes, the court found that “the underlying principles of agency upon which subordinate bias theories are based” were applicable to cat’s paw cases arising under the ADEA.<sup>119</sup> In line with this analysis, the court noted that, prior to *Staub*, the Tenth Circuit had applied the theory of cat’s paw liability to cases which arose under the ADEA.<sup>120</sup> The causation standard of the ADEA, however, required a closer link “between a subordinate’s animus and the ultimate employment decision” than the court believed would be required by the *Staub* standard.<sup>121</sup> The court found that “even after *Staub*, an ADEA plaintiff seeking to hold an employer liable through the discriminatory conduct of its subordinate must show the subordinate’s animus was a ‘but-for’ cause of the adverse employment action, i.e., it was the factor that made a difference.”<sup>122</sup> The court determined that Simmons could not show that, but for the alleged discriminatory animus, she would not have been fired<sup>123</sup> and therefore, cat’s paw liability could not be shown.<sup>124</sup>

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113. *Id.* at 949.

114. *Id.*

115. *Id.*

116. *Simmons*, 647 F.3d at 949 (citing *Gross v. FBL Fin. Servs. Inc.*, 562 U.S. 411, 419 (2009)).

117. *Id.*

118. *Id.* Here the court noted that *Staub* defined proximate cause by stating, “Proximate cause requires only some direct relation between the injury asserted and the injurious conduct alleged, and excludes only those links that are too remote, purely contingent, or indirect.” *Id.* (quoting *Staub v. Proctor Hosp.*, 562 U.S. 411, 419 (2011)).

119. *Id.* at 949.

120. *Id.* (citing *Schulte v. Potter*, 218 F. App’x 703, 719 (10th Cir. 2007)).

121. *Simmons*, 647 F.3d at 949 (citing *Lindsey v. Walgreen Co.*, 615 F.3d 873, 876 (7th Cir. 2010)).

122. *Id.* at 949-50 (citing *Jones v. Okla. City Pub. Sch.*, 617 F.3d 1273, 1277 (10th Cir. 2010)).

123. *Id.* at 950.

124. *Id.*

Not long after the Tenth Circuit decided *Simmons*, the Court of Appeals for the Seventh Circuit considered *Staub*'s proximate cause holding in relation to cases arising under the ADEA with *Wojtanek v. District No. 8 International Association of Machinists and Aerospace Workers*.<sup>125</sup> Plaintiff Mitchell Wojtanek was employed by Consolidated Container Corporation as a maintenance mechanic for four and a half years.<sup>126</sup> His employer terminated him when he was sixty-five years old, allegedly because of his poor work performance.<sup>127</sup> However, rather than bringing suit against his employer, this case came before the court as a claim against Wojtanek's union.<sup>128</sup>

Prior to his termination, Wojtanek had contacted his union steward, asking him to file a grievance related to concerns about safety.<sup>129</sup> Wojtanek then began experiencing hostile comments related to his age at the hands of his union steward, Zuniga.<sup>130</sup> These hostile comments occurred on a number of separate occasions.<sup>131</sup> After being terminated by Consolidated, Wojtanek, with the aid of union official Rufus Eskew and union steward Zuniga, underwent the union grievance process.<sup>132</sup> Following the unsuccessful union grievance process, Wojtanek filed suit, alleging that the union had not aided him sufficiently in his grievance process due to his age.<sup>133</sup>

Wojtanek alleged that the negative treatment and the age-related comments he suffered at the hands of Zuniga must be accredited to the union official, Eskew, under the theory of cat's paw liability.<sup>134</sup> Wojtanek claimed that Zuniga had "negatively influenced Eskew's advocacy by falsely reporting that he didn't want his job back."<sup>135</sup> The court first addressed the holding in *Staub*, stating "[f]or the theory to apply, the biased actions of someone who was not the decisionmaker must have been the proximate cause of an adverse action suffered by the plaintiff."<sup>136</sup> Finding that, in the event Wojtanek was able to show that Eskew was influenced by the age discrimination occurring at the hands of Zuniga, the standard in the ADEA would still not be satisfied, for, as

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125. See *Wojtanek v. Dist. No. 8 Int'l Ass'n of Machinists & Aero. Workers*, 435 F. App'x 545, 549 (7th Cir. 2011).

126. *Id.* at 546.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Wojtanek*, 435 F. App'x at 546.

131. *Id.* at 546-47.

132. *Id.* at 547.

133. *Id.* at 548.

134. *Id.* at 549.

135. *Wojtanek*, 435 F. App'x at 549.

136. *Id.* (citing *Staub v. Proctor Hosp.*, 562 U.S. 411, 422-23 (2011)).

in *Simmons*, the plaintiff is subject to a higher burden when bringing an action under the ADEA.<sup>137</sup> This burden required Wojtanek “show that age was the determinative factor—not just a motivating factor . . . .”<sup>138</sup> As Wojtanek could not show that “Eskew would have represented [him] differently ‘but for’ the comments made by Zuniga,” the court held that cat’s paw liability could not be applied.<sup>139</sup>

The Court of Appeals for the Third Circuit addressed the applicability of *Staub*’s proximate cause standard to cases arising under the ADEA in 2012, with *Marcus v. PQ Corporation*.<sup>140</sup> Plaintiffs Bonnie Marcus and Roman Wypart were employed by PQ Corporation.<sup>141</sup> Following the sale of the company, the new CEO implemented a reduction in the workforce.<sup>142</sup> This resulted in the termination of a number of employees, including the plaintiffs.<sup>143</sup> The plaintiffs alleged their inclusion in the reduction in force was based impermissibly on their age.<sup>144</sup>

On appeal, the defendant employer alleged that the district court erred in delivering an instruction for cat’s paw liability in a case arising under the ADEA.<sup>145</sup> Prior to the Supreme Court’s holding in *Staub*, the Third Circuit allowed plaintiffs to bring ADEA claims under the theory of cat’s paw liability.<sup>146</sup> Considering the viability of these claims following *Staub*, the court found that the approach had not changed.<sup>147</sup> Although USERRA, the statute at issue in *Staub*, employed a less demanding causation standard than the ADEA, the court noted “*Staub* is a case about proximate cause as it relates to principles of agency and vicarious liability. To have a viable claim under either statute using a

137. *Id.* at 549 (7th Cir. 2011) (citing *Simmons v. Sykes Enters.*, 647 F.3d 943, 949 (10th Cir. 2011)).

138. *Id.* at 549 (citing *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 129 S. Ct. 2343, 2352 (2009)); *Lindsey v. Walgreen Co.*, 615 F.3d 873, 876 (7th Cir. 2010)).

139. *Id.*

140. *See Marcus v. PQ Corp.*, 458 F. App’x 207, 211-12 (3d Cir. 2012).

141. *Id.* at 209-10.

142. *Id.* at 210.

143. *Id.*

144. *Marcus v. PQ Corp.*, No. 07-2075, 2011 U.S. Dist. LEXIS 16399, at \*1 (E.D. Pa. Feb. 17, 2011). This case came before the Third Circuit on appeal by both parties; at the district court level. “A jury ruled in Plaintiff’s favor, awarding substantial damages that were remitted by the District Court. PQ appeals the judgement, claiming that it is entitled to either judgment as a matter of law or a new trial. Plaintiffs filed a cross-appeal challenging the District Court’s denial of their post-verdict motion to mold the judgment to incorporate prejudgment interest and to account for negative consequences.” *Marcus*, 458 F. App’x at 209.

145. *Marcus*, 458 F. App’x at 211.

146. *Id.* (citing *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995) (“Under our case law, it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate.”)).

147. *Id.*

cat's paw theory, a plaintiff must surmount both the causation and vicarious liability hurdles."<sup>148</sup> Despite the greater difficulty the ADEA's causation standard creates for a plaintiff to bring a cat's paw liability case, the court referred to the statement of the Tenth Circuit in *Simmons*, noting that "the underlying principles of agency upon which subordinate bias theories are based apply equally to all types of employment discrimination."<sup>149</sup> Thus, the court determined that the district court was correct in delivering the instruction on cat's paw liability.<sup>150</sup>

The applicability of *Staub's* proximate cause holding to cases arising under the ADEA was most recently considered in *Sims v. MVM, Inc.*<sup>151</sup> In December of 2007, seventy-one year old Solomon Sims, Jr. accepted a supervisory position with MVM.<sup>152</sup> His immediate supervisor was Tom Davis.<sup>153</sup> After Sims had worked for MVM for some time, Davis determined that Sims's performance was unsatisfactory.<sup>154</sup> Due to financial issues, the Vice President at MVM notified Perkins, the project manager, that MVM needed fewer supervisors in March of 2008.<sup>155</sup> Perkins delayed taking action on the matter until August of 2008, when informed again that the number of supervisors needed to be reduced.<sup>156</sup> During a meeting with both Davis and Perkins, Sims was notified that he was one of the supervisors who would be included in the layoffs.<sup>157</sup> During this meeting his age was referenced, though "the parties dispute[d] who first brought it up."<sup>158</sup> In an Equal Employment Opportunity Commission charge of age discrimination, Sims alleged that Davis had made numerous negative comments related to his age.<sup>159</sup>

One of the arguments set forth by Sims was "that Perkins acted as a . . . cat's paw for Davis[]," who allegedly held a discriminatory animus regarding Sims's age.<sup>160</sup> In approaching the theory of cat's paw liability, the court first needed to determine if the approach originally taken by the Eleventh Circuit was affected by the *Staub* ruling.<sup>161</sup> The

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148. *Id.* at 212.

149. *Id.* (quoting *Simmons v. Sykes Enters., Inc.*, 647 F.3d 943, 949-50 (10th Cir. 2011)).

150. *Marcus*, 458 F. App'x at 212.

151. *Sims v. MVM, Inc.*, 704 F.3d 1327, 1334-37 (11th Cir. 2013).

152. *Id.* at 1329-30.

153. *Id.* at 1330.

154. *Id.*

155. *Id.*

156. *Sims*, 704 F.3d at 1330.

157. *Id.* See also *id.* at 1229 (explaining the acronym "RIF").

158. *Id.* at 1331.

159. *Id.*

160. *Id.* at 1334. Within this action, Sims also argued that Perkins was a biased decision maker.

161. *Sims*, 704 F.3d at 1335.



court noted the textual differences between the ADEA and USERRA, the statute considered in *Staub*.<sup>162</sup> With “but-for” causation language, “the ADEA requires more than what must ordinarily be proven under an analogous Title VII or USERRA action.”<sup>163</sup> Rather, “a ‘but-for’ cause requires a closer link than mere proximate causation; it requires that the proscribed animus have a determinative influence on the employer’s adverse decision.”<sup>164</sup> Based upon the higher causation standard required by the ADEA, the court followed the Tenth Circuit, determining that “the ‘proximate causation’ standard does not apply to cat’s paw cases involving age discrimination.”<sup>165</sup>

Despite the fact that *Staub*’s proximate cause rule would not apply, the court noted that “*Staub* is primarily a case about agency principles and vicarious liability . . . .”<sup>166</sup> Indeed, the court noted that the Eleventh Circuit’s prior cat’s paw liability caselaw suggested that it was appropriate “to apply agency principles in determining vicarious liability of an employer.”<sup>167</sup> Ultimately, the court found it unnecessary to decide if *Staub* modified its prior approach to cat’s paw liability under the ADEA “with respect to agency principles as they relate to scienter.”<sup>168</sup> Even assuming “arguendo that the *Staub* standard with respect to such agency principles” applied, Sims could not show that Davis’s discriminatory animus was the “but-for” cause of Perkins’s decision to terminate him.<sup>169</sup>

## 2. The Death of the Cat’s Paw?

The Court of Appeals for the Fifth Circuit had occasion to consider the application of *Staub*’s proximate cause holding to cases arising under the ADEA in August of 2012 with *Holliday v. Commonwealth Brands, Inc.*<sup>170</sup> Tilden Holliday was hired by Commonwealth Brands, Inc. (CBI) in 2001 at the age of forty-eight.<sup>171</sup> Throughout his time with CBI, Holliday received multiple reprimands for poor performance in the workplace.<sup>172</sup> Many came from his supervisor, Loren Trauth.<sup>173</sup>

162. *Id.* at 1335-36.

163. *Id.* at 1336 (citing *Simmons v. Sykes Enters. Inc.*, 647 F. 3d 943, 949-50 (10th Cir. 2011)).

164. *Id.* at 1335-36 (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009)).

165. *Id.* at 1336 (citing *Simmons*, 647 F. 3d at 949-50).

166. *Sims*, 704 F.3d at 1336.

167. *Id.*

168. *Id.*

169. *Id.* at 1336-37.

170. *See Holliday v. Commonwealth Brands, Inc.*, 483 F. App’x 917, 922 (5th Cir. 2012).

171. *Id.* at 918.

172. *See id.* at 919-20.

173. *See id.*

Holliday claimed these reprimands were “part of a plan developed by Trauth to get him fired and have him replaced with someone younger.”<sup>174</sup> To support this claim, Holliday reported multiple occasions where Trauth referenced his age.<sup>175</sup> Holliday was later fired by Hoke Whitworth, Trauth’s supervisor, and Bonita McIntyre, the Human Resources Manager.<sup>176</sup> Ultimately, Whitworth determined that Holliday needed to be terminated based upon information given to him by Trauth.<sup>177</sup>

This case came before the Fifth Circuit on Holliday’s claims under the ADEA.<sup>178</sup> The court ultimately determined that it could not find cat’s paw liability as Holliday did not offer “any evidence showing that Trauth had ‘influence or leverage’ over” those making the ultimate termination decision.<sup>179</sup> In coming to this decision, the court assumed that cat’s paw liability, as applied prior to *Staub*, was available for claims arising under the ADEA.<sup>180</sup> However, the court then revealed concern with the viability of these claims in a footnote.<sup>181</sup> The judges of the Fifth Circuit noted that, in deciding *Staub*, the Supreme Court paid careful attention to the phrase “motivating factor in the employer’s action.”<sup>182</sup> This language, however, is not present in the ADEA.<sup>183</sup> Recognizing the potential import of these differences, the Fifth Circuit stated:

Because the “motivating factor” phrase is not in the ADEA, and because the Court construed that phrase in recognizing “cat’s paw” liability under USERRA, and finally, because the Court has focused closely on the text of the antidiscrimination statutes in authorizing theories of liability, it could very well be that our prior recognition of “cat’s paw” liability under the ADEA was incorrect.<sup>184</sup>

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174. *Id.* at 919.

175. *Holliday*, 483 F. App’x at 919.

176. *Id.* at 920.

177. *See id.* at 919-20. Trauth sent multiple memos to Whitford detailing Mr. Holliday’s poor performance in the workplace. *Id.*

178. *Id.* at 918.

179. *Id.* at 921-22.

180. *Holliday*, 483 F. App’x at 922 (Holliday “relies on *Palasola v. Haggard Clothing Co.*, 342 F.3d 569, 578 (5th Cir. 2003), in arguing that age-related remarks by someone other than the formal decision-maker are probative of the employer’s discriminatory intent if that person is in a position to influence the decision. Assuming that this “cat’s paw” theory of liability is available under the ADEA . . .”).

181. *Id.* at 922 n.2.

182. *Id.* (quoting *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011)).

183. *Id.* *See also* The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (2012).

184. *Holliday*, 482 F. App’x at 922 n.2.

With this footnote, the Fifth Circuit highlighted the muddled waters created by *Staub* in cat's paw cases arising under the ADEA.<sup>185</sup>

### III. DISCUSSION

With *Staub v. Proctor Hospital*, the Supreme Court opened the door to a wide variety of problems to inevitably arise from attempted application of the rule's interpretation.<sup>186</sup> This Part will first discuss the scholarly criticism of the doctrine of proximate cause as generally applied to statutes. This Part will then discuss the highly criticized application of the doctrine to the field of employment discrimination. This Part will argue that, if approached correctly, the proximate cause holding of *Staub* could be applied to cases arising under the ADEA. This Part will finally suggest that this application is shown in the Third Circuit's decision in *Marcus v. PQ Corporation*. This Casenote will ultimately find that the approach taken by the Third Circuit provides a workable standard, should the Supreme Court revisit cat's paw liability cases in the context of the ADEA.

#### *A. Proximate Cause and Employment Discrimination*

The Supreme Court's encounter with cat's paw liability in *Staub v. Proctor Hospital* had been long awaited by the lower federal courts.<sup>187</sup> Rather than provide clarity in an area rife with unclear approaches,<sup>188</sup> the Court increased confusion by imputing proximate cause into the world of employment discrimination.<sup>189</sup> As leading scholars in the field of employment discrimination have noted, "there is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion," than the doctrine of proximate cause.<sup>190</sup>

Setting aside for a moment the context of employment discrimination, scholar Sandra Sperino has noted that the doctrine of proximate cause in general is problematic for a variety of reasons.<sup>191</sup> First, the concerns that underlie the doctrine of proximate cause are not uniform across the

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185. See Taylor, *supra* note 10, at 833-34.

186. *Id.* at 832.

187. Sullivan, *supra* note 36, at 1434.

188. Covell, *supra* note 1, at 160.

189. *Id.* at 160; Sperino, *supra* note 7, at 5-6; Taylor, *supra* note 10, at 832; Powderly, *supra* note 37, at 621.

190. Sperino, *supra* note 7, at 6 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 263 (W. Page Keeton Ed., 5th ed. 1984)).

191. Sperino, *supra* note 7, at 6.

courts.<sup>192</sup> Second, despite the vast amount of definitions and approaches taken, “proximate cause inherently relates to policy decisions about where liability should end.”<sup>193</sup> Each of the different approaches provides a “preference about where the line should be drawn.”<sup>194</sup> Third, the goals behind applying doctrine are constantly in flux, evolving over time.<sup>195</sup> “Finally, courts vary the use of proximate cause in tort cases, depending on whether the underlying tort is intentional.”<sup>196</sup>

As discussed previously, the theory of proximate cause has been defined in many ways.<sup>197</sup> When seeking to apply this theory, each respective court is influenced significantly by the elements of the tort with which it is dealing.<sup>198</sup> These elements, depending upon which tort the court is faced with, shape, and ultimately determine, the definition of proximate cause the court chooses to apply.<sup>199</sup> In addition to the elements of the tort, courts are also influenced by the underlying policy concerns and goals that come with the case.<sup>200</sup> Scholars studying the theory of proximate cause have asserted that the theory, in and of itself, cannot be independently defined.<sup>201</sup>

The primary area of tort law to which the doctrine of proximate cause has been applied is that of negligence.<sup>202</sup> In intentional tort cases, “[p]roximate cause rarely plays a decisive role.”<sup>203</sup> As noted by scholars, only a small number of cases involving intentional torts deal with multiple causes.<sup>204</sup> Additionally, courts have fewer issues determining the scope of liability when the conduct was clearly intended to cause harm.<sup>205</sup> Despite the plethora of definitions used when seeking

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. Sperino, *supra* note 7, at 6.

197. *Id.* at 6-8. As found by Sperino, “[s]ome courts use proximate cause to determine whether some intervening action cuts off the original actor’s liability. In thinking about superseding cause, the court is often determining that the acts of a third party interrupt the sequence of conduct, consequence, and injury between the defendant and plaintiff such that liability of the defendant is no longer appropriate.” *Id.* at 7.

198. *Id.* at 7, 9.

199. *Id.*

200. *Id.* at 7.

201. Sperino, *supra* note 7, at 7, 9 (quoting Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471-72 (1950)) (“At least one commentator has asserted that proximate cause has no inherent meaning, but substitutes for other elements of a cause of action when the decision on that element is difficult.”).

202. Sullivan, *supra* note 36, at 1459; *see also* Sperino, *supra* note 7, at 10.

203. Sperino, *supra* note 7, at 10.

204. *Id.* at 10 (citing Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 832 (2009)).

205. Sperino, *supra* note 7, at 10.

to define the theory of proximate cause, one common theme stands out: each of the definitions serve to aid the court in determining the scope of liability for a given harm.<sup>206</sup> When the cause of the harm is readily apparent, as is often the case with intentional torts, “the necessity and strength of proximate cause doctrine severely diminishes.”<sup>207</sup>

The complexity of the doctrine of proximate cause is only increased when considered in the context of employment discrimination.<sup>208</sup> Notably, the doctrine was not necessary for the *Staub* Court to use in reaching its decision.<sup>209</sup> Had the Court simply relied on “cause in fact” the result would have been the same.<sup>210</sup> Furthermore, “it appears that the Court reaches for proximate cause because it is concerned that it might be unfair to hold employers liable in all instances when biased conduct somehow factually causes an employment decision.”<sup>211</sup> Further negative effects of the holding in *Staub* can be identified regarding its application to the ADEA.<sup>212</sup>

### *B. Proximate Cause and the ADEA*

The use of proximate cause has led to immense confusion in the context of the ADEA.<sup>213</sup> When applied, the doctrine of proximate cause focuses heavily on the elements of the underlying cause of action brought before the court.<sup>214</sup> The consideration of the cat’s paw cases brought under the ADEA required each respective court to consider the “but-for” causation standard of the ADEA.<sup>215</sup> When *Staub*’s holding was brought into the discussion, the majority of the courts struggled to reconcile the language of the ADEA with the doctrine of proximate

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206. *Id.* at 6.

207. *Id.* at 10.

208. Sperino, *supra* note 7, at 3; Sullivan, *supra* note 36, at 1448.

209. Sullivan, *supra* note 36, at 1457; *see also* Sperino, *supra* note 7, at 5 n.18 (noting in a footnote that “[t]he proximate cause language in *Staub* is arguably dicta, because the case’s core issue relates to factual cause.”).

210. Sullivan, *supra* note 36, at 1457-58.

211. Sperino, *supra* note 7, at 5-6.

212. Taylor, *supra* note 10, at 832-33.

213. *Id.* at 832-34; *see also* Sullivan, *supra* note 36, at 1434; Sperino, *supra* note 7, at 3.

214. Sperino, *supra* note 7, at 7, 9.

215. *See* Gross v. FBL Fin. Servs., 557 U.S. 167, 177 (2009); Sharp v. Aker Plant Servs. Group, Inc., 726 F.3d 789, 797 (6th Cir. 2013) (quoting Allen v. Highlands Hosp. Corp., 545 F.3d 387, 393-94 (6th Cir. 2008) (“Age discrimination claims brought under the Kentucky Civil Rights Act are analyzed in the same manner as ADEA claims.”)); Sims v. MVM, Inc., 704 F.3d 1327, 1335-37 (11th Cir. 2013); Holliday v. Commonwealth Brands, Inc., 483 F. App’x 917, 921 (5th Cir. 2012); Marcus v. PQ Corp., 458 F. App’x 207, 211-212 (3d Cir. 2012); Wojtanek v. Dist. No. 8, Int’l Ass’n of Machinists & Aero. Workers, F. App’x 545, 549 (7th Cir. 2011); Simmons v. Sykes Enters., 647 F.3d 943, 949-50 (10th Cir. 2011).

cause.<sup>216</sup> For example, in *Simmons v. Sykes Enterprises, Inc.*, when determining whether the *Staub* holding applied, the court stated, “[i]f we were to apply *Staub* directly to an age-discrimination case, the plaintiff would then only need to prove her supervisor’s animus was somehow related to the termination and not that the animus was necessary to bring about the termination.”<sup>217</sup> Judges sitting in the circuit courts failed to realize that the proximate cause holding of *Staub* actually could be applied to the causation standard of the ADEA to resolve cat’s paw cases.<sup>218</sup>

Despite the fact that there are multiple explanations, the doctrine of proximate cause primarily focuses on where, in a course of events, liability should cease.<sup>219</sup> In considering this, the elements of the underlying cause of action play a major role.<sup>220</sup> In the case of issues arising under the ADEA, a plaintiff must be able to show “but-for” causation.<sup>221</sup> In defining “but-for” causation, respected scholars have noted, “[i]f the plaintiff would have suffered the same harm had the defendant not acted negligently, the defendant’s conduct is not a factual cause of the harm.”<sup>222</sup> Considering the doctrine of proximate cause, the various definitions given to proximate cause are “hopelessly tied up in goals and policies related to the underlying cause of action.”<sup>223</sup> Thus, rather than applying the doctrine of proximate cause as applied in *Staub*,<sup>224</sup> this interpretation would result in applying the doctrine with the ADEA’s policy goals in mind, finding liability only where the consideration of the plaintiff’s age by the supervisor was the “but-for” cause of the adverse employment action ultimately taken by the non-biased supervisor.<sup>225</sup> This application of the *Staub* holding would

216. See *Sims*, 704 F.3d at 1335-36; *Holliday*, 483 F. App’x at 922; *Wojtanek*, 435 F. App’x at 549; *Simmons*, 647 F.3d at 1335-36; see also Taylor, *supra* note 10, at 833-34.

217. *Simmons*, 647 F.3d at 949.

218. See Covell, *supra* note 1, at 183 (“In cases after *Staub*, many employees seeking to proceed on a cat’s paw theory have not realized the potential benefit of the proximate cause standard because lower courts’ over-reliance on the facts in *Staub* have narrowed the circumstances in which *Staub* would apply.”).

219. Sperino, *supra* note 7, at 6.

220. *Id.* at 7, 9.

221. See The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (2012); see Gross v. FBL Fin. Servs., 557 U.S. 167, 177 (2009).

222. DOBBS ET AL., *supra* note 68, at § 186.

223. Sperino, *supra* note 7, at 7; see also Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. 1199, 1203 (2013) [hereinafter *Statutory Proximate Cause*].

224. Covell, *supra* note 1, at 183; see also *Statutory Proximate Cause*, *supra* note 223, at 1237 (“[I]f a court uses one rationale to apply proximate cause to a statutory regime, it does not follow that the court can then use the same reasoning to read a different rationale into another statute.”).

225. The Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623 (2012); see also Gross v. FBL Fin. Servs., 557 U.S. 167, 176-77 (2009); *Simmons v. Sykes Enters.*, 647 F.3d 943, 949-50 (10th Cir. 2011) (“Thus, even after *Staub*, an ADEA plaintiff seeking to hold an employer liable through the

comport with the holding of *Gross v. FBL Financial Services*.<sup>226</sup> Although the majority of the circuits ultimately came to this conclusion, requiring but-for causation be met,<sup>227</sup> the idea that such could not be done when applying proximate cause is incorrect.<sup>228</sup>

This is most appropriately illustrated by the court in *Marcus v. PQ Corporation*.<sup>229</sup> Though the *Marcus* decision has been interpreted as determining that *Staub*'s proximate cause holding does not apply to cat's paw liability cases arising under the ADEA,<sup>230</sup> the court notes,

[a]lthough USERRA imposes a more lenient causation requirement than does the ADEA, *Staub* is a case about proximate cause as it relates to principles of agency and vicarious liability. To have a viable claim under either statute using a cat's paw theory, a plaintiff must surmount both the causation and vicarious liability hurdles.<sup>231</sup>

Here the court was able to approach the *Staub* holding in a sensible manner, while additionally maintaining the proper reverence to the previous Supreme Court holdings regarding the age discrimination statute.<sup>232</sup> Additionally, as can be inferred from the above quotation, it seems that in doing so, the court was able to separate cause in fact from proximate cause.<sup>233</sup> As noted by scholars, "[s]ince proximate cause is essentially about limiting liability, courts must consider these other provisions when determining the appropriate space, if any, for proximate cause to operate within the statutory regime."<sup>234</sup> In line with this, the court was careful to note that one must still overcome the necessary causation in order to bring a claim.<sup>235</sup> Causation is simply more difficult to meet due to the holding in *Gross v. FBL Financial*

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discriminatory conduct of its subordinate must show the subordinate's animus was a 'but-for' cause of the adverse employment action . . ."); Covell, *supra* note 1, at 183.

226. See *Gross*, 557 U.S. at 176-77; see also *Simmons*, 647 F.3d at 949-50.

227. See *Sims v. MVM, Inc.*, 704 F.3d 1327, 1335-37 (11th Cir. 2013); *Holliday v. Commonwealth Brands, Inc.*, 483 F. App'x 917, 921-22 (5th Cir. 2012); *Wojtanek v. Dist. No. 8, Int'l Ass'n of Machinists & Aero. Workers*, 435 F. App'x 545, 549 (7th Cir. 2011); *Simmons v. Sykes Enters.*, 647 F.3d 943, 949-50 (10th Cir. 2011).

228. See Covell, *supra* note 1, at 183 ("In cases after *Staub*, many employees seeking to proceed on a cat's paw theory have not realized the potential benefit of the proximate cause standard because lower courts over-reliance on the facts in *Staub* have narrowed the circumstances in which *Staub* would apply."); *Marcus v. PQ Corp.*, 458 F. App'x 207, 212 (3d Cir. 2012).

229. See *Marcus*, 458 F. App'x at 212.

230. *Larison v. Northern Kentucky Univ.*, No. 2013-CA-001721-MR, 2016 WL 1069130, at \*8 (Ken. Ct. App. March 18, 2016).

231. *Marcus*, 458 F. App'x at 212.

232. See *Gross*, 557 U.S. at 177; *Marcus*, 458 F. App'x at 212.

233. See *Marcus*, 458 F. App'x at 212.

234. *Statutory Proximate Cause*, *supra* note 223, at 1226.

235. See *Marcus*, 458 F. App'x at 212.

*Services*—“but-for” causation must be met under the ADEA.<sup>236</sup> Based upon this analysis, if the Supreme Court reconsidered cat’s paw liability under the ADEA and determined that the proximate cause holding is to continue, the *Marcus* court’s approach would offer the ability to apply proximate cause in the proper manner—separate from the factual causation standard necessary in the ADEA.<sup>237</sup>

#### IV. CONCLUSION

When the justices of the Supreme Court sat down to consider *Staub v. Proctor Hospital* in 2011, they sat down intending to settle a split among the circuits.<sup>238</sup> By referencing the similarities between USERRA and Title VII, the Court led many to believe that the decision was to be wide sweeping in its applicability to employment discrimination statutes.<sup>239</sup> By including the doctrine of proximate cause in the holding, the court included a ticking time bomb, one recognized by Justice Alito in his concurrence: “[t]he Court’s . . . approach . . . is almost certain to lead to confusion and is likely to produce results that will not serve the interests of either employers or employees . . . .”<sup>240</sup> Although the doctrine of proximate cause can, in fact, be applied to cat’s paw liability cases arising under the ADEA, *Staub*’s damage is already done.<sup>241</sup> Were the Supreme Court to reconsider cat’s paw liability in the context of the ADEA, the *Marcus* decision would be the proper place to begin.

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236. *Id.* See also *Gross*, 557 U.S. at 177.

237. *Statutory Proximate Cause*, *supra* note 223, at 1202; see also *DOBBS ET AL.*, *supra* note 68, at §198; Sullivan, *supra* note 36, at 1457.

238. Covell, *supra* note 1, at 160.

239. Sullivan, *supra* note 36, at 1435-36; see also Taylor, *supra* note 10, at 833; Sperino, *supra* note 7, at 5.

240. *Staub v. Proctor Hosp.*, 562 U.S. 411, 426 (2011) (Alito, J., concurring); see also Taylor, *supra* note 10, at 832.

241. Powderly, *supra* note 37, at 621 (“[T]he Supreme Court failed to provide much guidance to the courts, and instead, created more questions than answers. Left most bewildered by this decision are the modern employers who face tremendous uncertainty in the wake of this landmark decision.”); see also Taylor, *supra* note 10, at 832; Covell, *supra* note 1, at 160.



